INDEX.

Statement of the Matter 1

Argument 5

In the Circumstance of the Admitted Failure of the Petitioner to Comply With Applicable Limitation Sections of the Ohio Probate Code, the Estate of the Decedent is Without Liability as a Matter of Law 5

The Sections of the Ohio Probate Code Can Be Given Their Intended Controlling Effect Without in Any Way Impinging Upon the Bankruptcy Act or Upon the Jurisdiction of the Bankruptcy Court 7

The Revivor of Actions Pending at the Time of the Decedent's Death Did Not Dispense With the Necessity of the Petitioner's Compliance With the Applicable Provisions of the Ohio Probate Code 9

Conclusion 11

TABLE OF AUTHORITIES.

Cases.

Beach v. Mizner, 131 Ohio St. 481 (1936) 6

Bollinger v. National Fire Ins. Co. (Sup. Ct. Cal. 1944), 147 Pac. 2d 611, reversed on other grounds, 154 Pac. 2d 399 (1945) 8-9

Burnham v. Todd (C. C. A. 5, 1943), 139 F. 2d 338 8

Carr v. Yokohama Specie Bank, Ltd., et al. (N. Y. Sup. Ct. App. Div. 1947), 272 App. Div. 64, 69 N. Y. S. 2d 262 8

Fern v. Leuthold, et al., 39 Minn. 212, 39 N. W. 399 (1888) 10

Hummel v. Equitable Assurance Society (C. C. A. 7, 1945), 151 F. 2d 994 8

McBride v. Farrington (D. C. Ore. 1945), 60 F. Supp. 92, aff'd. 156 F. 2d 971 (C. C. A. 9, 1946)..... 8

Prudential Ins. Co. of America v. Joyce Building Realty Co., et al., 143 Ohio St. 564 (1944)..... 6

Stange, Admr. v. Campbell, Admr., 75 Ohio App. 316 (1945) 6

State, ex rel. v. Coburn, 133 Ohio St. 192 (1938)..... 6

Statutes.

Bankruptcy Act 7, 8

Chandler Act 7, 8

Ohio Probate Code:

G. C. 10509-112 .....3, 5, 10

G. C. 10509-134 .....3, 5, 10

G. C. 10509-216 .....3, 5, 6, 10

11 U. S. C. A. Sec. 29(e)..... 7

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 635.

In the Matter of
THE HIGBEE COMPANY,
Debtor.
BANKRUPTCY No. 36,119.

ROBERT R. YOUNG,
Petitioner,

v.

JOHN P. MURPHY and
GERTRUDE BAKER BRADLEY and ALVA BRADLEY,
Executors of the Estate of Charles L. Bradley, Deceased,
Respondents.

BRIEF OF RESPONDENTS, GERTRUDE BAKER BRADLEY AND ALVA BRADLEY, EXECUTORS OF THE ESTATE OF CHARLES L. BRADLEY, DECEASED, OPPOSING PETITION FOR CERTIORARI, ON ISSUE OF LIMITATIONS.

STATEMENT OF THE MATTER.

With no lack of confidence in the defenses common to themselves and to respondent John P. Murphy, Gertrude Baker Bradley and Alva Bradley, Executors of the Estate of Charles L. Bradley, Deceased, make this brief statement of the matter involved, for the purpose of presenting a defense accruing to them alone which does not appear from the other briefs before the Court but which is "in reserve" in the sense that determination of the issue has so far been unnecessary to complete vindication of the rights of the

Estate of Charles L. Bradley, deceased, and of John P. Murphy, jointly presented.

The issue in question is the admitted failure of the petitioner to file with the respondent executors within the period prescribed by state law, any claim setting forth his asserted right to represent shareholders of the company in the attempt to compel an accounting by the estate which the respondents filing this brief represent, as well as by the said Murphy. There is no denial of the few simple facts which give rise to this issue (See Petitioner's Brief, p. 11).

In short, Charles L. Bradley, over a period of several years prior to his death, was a co-defendant with John P. Murphy in the numerous tests instituted by the petitioner of their joint right to the Higbee securities representing the avails to Bradley and Murphy of the debtor's plan of reorganization, overwhelmingly accepted by the debtor's stockholders, including the petitioner, and approved not only by the District Court but by the Circuit Court of Appeals for the Sixth Circuit. In the ebb and flow of this litigation over a period of several years, Bradley and Murphy were represented by common counsel, whose skill is attested by their uniform success in vindicating their clients' rights.

On December 18, 1943, however, Charles L. Bradley died; his executors were appointed by the Probate Court of Cuyahoga County, Ohio and qualified as fiduciaries on December 23, 1943 (R. 39). At this time two actions instituted by the petitioner were pending against the decedent and Murphy in the Circuit Court of Appeals; one asserted ownership of the Higbee securities by Young and his associates, while the other sought to compel an accounting by Potts and Boag, and Bradley and Murphy of alleged unconscionable avails to the former from the sale to Bradley and Murphy of shares in the Higbee Company which permitted confirmation of the reorganization plan. On

February 23, 1944, both actions were revived as against the Executors of the Estate of Charles L. Bradley, Deceased (R. 39). The former action was decided by the Circuit Court of Appeals in favor of the respondent fiduciaries and Murphy on April 21, 1944 (142 F. 2d 658), and certiorari was denied in this Court on November 13, 1944 (323 U. S. 775). The latter action came to an end on May 15, 1944 (142 F. 2d 1004), upon the denial by the Circuit Court of Appeals of the petitioner's attempt to compel an accounting; this action by the appellate court became final as to the representatives of Charles L. Bradley and as to John P. Murphy on failure of the petitioner to apply for a writ of certiorari as to them. A writ was applied for only as to Potts and Boag. See: 324 U. S. 204, Note 4 at page 208 (R. 7). Only upon reversal of the Circuit Court of Appeals' holding and upon this Court's requiring an accounting of Potts and Boag pursuant to the opinion filed on February 26, 1945, did the petitioner by his present petition for an accounting filed on May 19, 1945 (R. 2) seek once again to compel an accounting by Bradley's executors and by the respondent Murphy.

Then for the first time, it became apparent, with the failure of the petition (R. 2) to state that a claim asserting the petitioner's accounting demands had been timely filed with the decedent's executors, that the estate was entitled to the benefit of the non-claim sections of the Ohio Probate Code (General Code, Secs. 10509-112, 10509-134, 10509-216, *infra*, pp. 5-6). Wishing to see the issue tested, the respondent executors applied to the Probate Court for the appointment of special counsel. The question was initially raised through motion to dismiss and later, at the request of the District Court, by answer. That court held for the respondents on defenses common to them both. Taking note of the fact that the petitioner had stipulated (R. 39) that at no time had any claim been filed with the respondent executors, the trial court said (R. 270-71):

> "There is strong support for the Bradley Estate's motion to dismiss and except for the fact that the issues on the merits are so clearly against recovery I otherwise should have been inclined to sustain the motion. If, as the petitioner seems to contend, this proceeding is an entirely new and different claim against Bradley, it has been asserted too late to avoid the consequences of Bradley's death and the required compliance with probate laws of Ohio in respect of making or filing claim in that court."

Thereafter the admitted facts were embodied in the court's journal entry (Finding 15, R. 276; Conclusion 7, R. 277-78), while at the same time the court formally overruled the motion to dismiss initially filed by the respondent fiduciaries. In the Circuit Court of Appeals the rights of the respondents were again held to be completely vindicated within the framework of their common defenses, the court stating with reference to the special defense of limitations available to the respondent executors (R. 293):

> "Inasmuch as we have concluded that appellant Young is foreclosed from reopening his contest with Murphy and Bradley over the subject matter of his petition now under review, we pretermit as useless discussion of the secondary defense of the Bradley estate, based upon the argument that appellant has failed to comply with applicable limitation sections of the Ohio Probate Code."

ARGUMENT.

IN THE CIRCUMSTANCE OF THE ADMITTED FAILURE OF THE PETITIONER TO COMPLY WITH APPLICABLE LIMITATION SECTIONS OF THE OHIO PROBATE CODE, THE ESTATE OF THE DECEDENT IS WITHOUT LIABILITY AS A MATTER OF LAW.

The motion to dismiss filed by the respondent fiduciaries through their special counsel appointed by the Probate Court of Cuyahoga County, Ohio, was based solely on the petitioner's admitted failure, apparent initially on the face of the petition (R. 2-4) and later in counsel's stipulation (R. 39), to comply with Ohio General Code Secs. 10509-112 and 10509-134, and perhaps in petitioner's view, with Sec. 10509-216 and related statutes. So far as apposite, these sections of the Ohio Probate Code provide as follows:

> "Sec. 10509-112. *Presentation and allowance of creditors' claims.*—All claimants shall present their claims to the executor or administrator in writing, including claims arising out of contract, out of tort, on cognovit notes or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated. *All claims shall be presented within four months after the date of the appointment of the executor or administrator.* * * * Claims which are contingent need not be presented except as otherwise provided in this chapter."

> "Sec. 10509-134. *Presentation of claims after four months.*—A claimant who has failed to present his claim to the executor or administrator within the time prescribed by law may file a petition in the probate court for authority to present his claim after the expiration of such time. * * * *provided, however, that a claim which is not presented within nine months from the appointment of the executor or administrator shall be forever barred as to all parties, including devisees, legatees and distributees, and no payment shall be made nor any action maintained thereon, except as otherwise provided in this chapter with reference to contingent claims.* * * *"

"Sec. 10509-216. *Contingent claims; when to be presented.*—If a claim is contingent at the time of the decedent's death and a cause of action subsequently accrues thereon, such claim must be presented to the executor or administrator, in the same manner as other claims, *before the expiration of four months after the appointment of the executor or administrator or before the expiration of two months after the cause of action accrues, whichever is later,* * * *." (Emphasis supplied in each reference.)

It is definitely admitted in the record that the petitioner at no time presented any claim to the Executors of Charles L. Bradley's Estate asserting in a representative capacity or otherwise the alleged right to an accounting by the respondents. If, for the purpose of argument the filing of the instant action were to be considered the presentation of a "contingent claim," it came too late in the circumstance of the Supreme Court decision in the Potts-Boag matter on February 26, 1945, and the filing of the respondents' petition in accounting on May 19, 1945, more than two months thereafter.

It has been repeatedly held in Ohio that the statutes in question are related and when considered together as their context requires, constitute statutes of limitation or non-claim barring any and all actions against a decedent's estate based on claims which have not been timely presented. *Beach v. Mizner,* 131 Ohio St. 481 (1936); *State, ex rel. v. Coburn,* 133 Ohio St. 192 (1938); *Prudential Ins. Co. of America v. Joyce Building Realty Co., et al.,* 143 Ohio St. 564 (1944); *Stange, Admr. v. Campbell, Admr.,* 75 Ohio App. 316 (1945).

It is perhaps worthy of remark that statutes of this nature are quite obviously intended to facilitate the prompt administration of decedents' estates; they assure a proper sequestration of the assets of a decedent, their application to proved claims of creditors and to tax claims, and their early distribution according to the statutes of descent and distribution or in accordance with the testator's last will

and testament. These purposes are quite like the aims served by the Bankruptcy Act; they should not be put in jeopardy by the failure of Federal courts to enforce the applicable sections as statutes of repose, at least in the circumstances of the endless litigation brought by the petitioner against the decedent Charles L. Bradley, as well as against his estate following his death.

THE SECTIONS OF THE OHIO PROBATE CODE CAN BE GIVEN THEIR INTENDED CONTROLLING EFFECT WITHOUT IN ANY WAY IMPINGING UPON THE BANKRUPTCY ACT OR UPON THE JURISDICTION OF THE BANKRUPTCY COURT.

Nothing in the Bankruptcy Act or in the Chandler Act applicable to the Higbee reorganization proceedings after its effective date on September 22, 1938, militates against the conclusion that the sections of the Ohio Probate Code here involved, when coupled with the admitted failure of the petitioner to apprise the respondent executors of his "entirely new and different claim" (R. 276-78), effectively and conclusively bar the claim now asserted in the trustee-less debtor's behalf against the Estate of Charles L. Bradley, Deceased. Section 11(e) [11 U. S. C. A. Sec. 29(e)] of the amending legislation reads in part:

> "(e) A receiver or trustee may, within two years subsequent to the date of adjudication *or within such further period of time as the Federal or State law may permit,* institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * * *where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act,* and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, *the receiver or trustee of the bankrupt may, for the benefit of the estate, take any*

*such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted * * * in the proceeding or by applicable Federal or State law, as the case may be.*" (Emphasis supplied.)

There being authority for the position that this limitation section incorporated in the Bankruptcy Act by the Chandler Act has application only to claims in favor of the debtor in existence at the time a trustee qualifies or favorable action is had on a petition for reorganization (See: *Burnham v. Todd* [C. C. A. 5, 1943], 139 F. 2d 338), Section 11(d) of the Bankruptcy Act prescribing a two-year period of limitation dating from the order closing the estate, an order entered in the Higbee reorganization proceedings on December 1, 1942 (R. 165-67), might have application. If it did, the petitioner's claims would be barred as to both defendants.

If no limitation period is prescribed in the Bankruptcy Act as amended, reaching a claim of the nature here asserted, it is clear that state statutes of limitation have effect (*Burnham v. Todd, supra*), and this is particularly true where a claim, such as that here under consideration, is based on general equitable doctrines which have no reference to and are not the creature of the Bankruptcy Act itself. See: *McBride v. Farrington* (D. C. Ore. 1945), 60 F. Supp. 92, aff'd. 156 F. 2d 971 (C. C. A. 9, 1946); *Hummel v. Equitable Assurance Society* (C. C. A. 7, 1945), 151 F. 2d 994. It must be obvious, therefore, that the claim here asserted by the petitioner falls within the provisions of Ohio Probate Code insofar as it relates to assertion of any rights to the Higbee securities held by the Estate of Charles L. Bradley, Deceased. This is also the rule under applicable state decisions. *Carr v. Yokohama Specie Bank, Ltd., et al.* (N. Y. Sup. Ct. App. Div. 1947), 272 App. Div. 64, 69 N. Y. S. 2d 262; *Bollinger v. National Fire Ins. Co.* (Sup. Ct. Cal.

1944), 147 Pac. 2d 611, reversed on other grounds, 154 Pac. 2d 399 (1945).

Giving effect to the limitation sections of the Ohio Probate Code will in no way impinge upon the exercise of proper bankruptcy jurisdiction. The respondent executors have awaited and complied with every order of the Bankruptcy Court and have perfected their rights to the securities now in question only after those rights had been contested by the petitioner in various suits, the most recent of which resulted finally upon a denial of a writ of certiorari by this Court [323 U. S. 775 (1944)]. Thus, there is no contest between the state statutes of limitation and the provisions of the Chandler Act on the one hand, or the proper exercise of general bankruptcy functions on the other. By its very terms the Chandler Act envisages and authorizes the application of state statutes of limitation to claims such as are here involved, arising after the adjudication in bankruptcy.

THE REVIVOR OF ACTIONS PENDING AT THE TIME OF THE DECEDENT'S DEATH DID NOT DISPENSE WITH THE NECESSITY OF THE PETITIONER'S COMPLIANCE WITH THE APPLICABLE PROVISIONS OF THE OHIO PROBATE CODE.

Mention in the petitioner's brief (at page 11 thereof) of the revivor of two actions pending at the date of the death of Charles L. Bradley, Deceased, is indicative of an intention, if the opportunity is presented, to contend that this action eliminated the necessity for the presentation of the petitioner's claim to the decedent's executors. On the record (R. 39) the revivor of these actions (the one, the contest which ultimately established the right of the Bradley Estate and Murphy to the Higbee securities; the other, the accounting action against Potts and Boag, and Bradley and Murphy), took place on February 23, 1944, but two months following the qualification of the decedent's executors, when an additional period of at least two months.

under General Code Secs. 10509-112 and 10509-216, or on a proper showing, up to seven months under Sec. 10509-134, remained. If the petitioner did not then intend to find full satisfaction in the litigation of the claims in which he was at that time engaged, it would have been a simple matter to comply with the non-claim statutes, at the same time advising the respondent executors of the endless litigation with which they were still confronted.

While the authority is limited, that which is available is clearly to the effect that the revivor in the name of the executors of an action pending against a decedent at his death can affect only the claims in suit at the time of the revivor and does not constitute a permanent dispensation for all purposes with the necessity for compliance with limitations of the nature prescribed by the Ohio Probate Code. *Fern v. Leuthold, et al.*, 39 Minn. 212, 39 N. W. 399 (1888). Reason and logic support this view; as the Supreme Court of Minnesota, in the case cited, said:

> "* * * the respondents had no standing in court as creditors; having neither presented their claims for allowance to the probate court within the time limited for that purpose, nor having any suit pending on them against Fern at the time of his death. Not having been presented to the probate court for allowance, the claims were certainly barred under the provisions of Gen. St. c. 53, Sec. 14, unless saved by section 16 of the same chapter, by reason of the pendency of an action on them at the time of Fern's death. But we take it that, to bring the case within this section, *the specific claim or cause of action must be in litigation at the time of the debtor's decease. Only the claim thus in litigation can be paid without being proved in the probate court.*
>
> *"It is not enough that the deceased was a party to an action for another purpose; nor can an action brought for some other purpose be changed, after his death, into one for the recovery of a debt against his estate.* * * *
>
> "We think we are justified by the record in saying that the idea of holding Fern liable was an afterthought, that did not enter into the minds of the parties

when framing their pleadings; * * *." (39 N. W. at pp. 401-2, emphasis supplied.)

CONCLUSION.

For the reasons stated and on the authorities cited it is apparent that the issue of limitations under the Ohio Probate Code, while denominated by the Circuit Court of Appeals a "secondary defense," is a complete protection as a matter of law for the Estate of Charles L. Bradley, Deceased, which has so far prevailed in this latest contest initiated by the petitioner on the strength of the defenses common to it and to the living defendant, John P. Murphy. There appears, however, no special or important reason for this Court separately to consider this issue except as a bulwark to the common defenses already found completely sufficient by both the district and appellate courts. There has been no decision in the lower courts on this question of local law, since the District Court and the Circuit Court of Appeals held unqualifiedly with the defenses jointly put forward in behalf of the respondent estate and its fellow respondent, Murphy. There appears no departure from the accepted and usual course of judicial proceedings which would furnish the occasion for this Court's considering the indicated additional defense available to the Bradley Estate, except in the event that the views of this Court on the availability and force of the common defenses depart from the views of the lower courts, as cannot be foreseen at this late stage of the litigation instituted and reinstituted by the petitioner.

The writ of certiorari sought should be denied.

Respectfully submitted,

RAYMOND T. JACKSON,
DWIGHT B. BUSS,
Of Special Counsel for Gertrude Baker Bradley and Alva Bradley, Executors of the Estate of Charles L. Bradley, Deceased.